UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADT LLC

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Cases 16-CA-144548
16-CA-168863
16-CA-172713
16-CA-179506
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16-CA-191963
16-CA-199947
16-CA-200961
16-CA-209070
16-CA-209995

RESPONDENT ADT'S POST-HEARING BRIEF

Jeremy C. Moritz, Esq.
Norma Manjarrez, Esq.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
155 North Wacker Drive - Suite 4300
Chicago, IL 60606
Phone: (312) 558-1220
Facsimile: (312) 807-3619

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Respondent ADT LLC d/b/a ADT Security Services (the "Respondent" or "ADT"), by and through its attorneys and pursuant to Section 102.42 of the Board's Rules and Regulations, submits this Post-Hearing Brief to Administrative Law Judge Robert A. Ringler in connection with the above-captioned proceeding.

INTRODUCTION

This case centers around ADT's withdrawal of recognition from the Communication Workers of America (the "Charging Party" or the "Union"). ADT acted based on objective evidence that since the restructuring of ADT's Dallas/Fort Worth ("DFW") operations in 2014 the Union lost majority status among the installation and service technicians in the DFW area. Despite an extensive record in the 2014 RM case, Case No. 16-RM-123509, replete with evidence that the

consolidated group of installation and service technicians in ADT's DFW facilities — a group consisting of legacy union employees[1], former Broadview non-union employees and new hires — share similar working conditions, benefits, pay, locations, supervision and perform the same or similar work, the Union refuses to acknowledge the presence of Broadview technicians (or P1 technicians who were acquired through a 2016 merger between ADT and Protection One). The Union has no basis in fact or in law for a presumption of majority status with regard to the new unit of installation and service technicians. To recognize the Union as the bargaining representative of all installation and service technicians at ADT's DFW facilities would violate well-established Board precedent. The 2014 merger of Broadview and ADT rendered the preexisting bargaining unit a minority by about two to one. The 2016 merger of ADT and Protection 1 has only further deteriorated the possibility of majority status.

Under Board precedent, ADT could have (and in retrospect should have) withdrawn recognition of the Union in 2014. Instead, at the suggestion of the National Labor Relations Board (the "Board"), ADT filed an RM petition seeking a secret ballot election in a unit of all "install and service technicians at ADT's Carrollton, Tyler, Trinity, and Haltom City facilities in the Dallas/Fort Worth area" to determine whether there was continuing support for the Union. The RM proceedings included a hearing to determine the appropriate unit wherein employees including William Skelton and Arthur Whittington testified, a full campaign election and an election in April 2015 wherein Mr. Skelton and Mr. Whittington participated as election observers. Those ballots,

[1] Legacy employees refers to all installation and service technicians historically represented by the Union. Broadview employees refers to all unrepresented installation and service technicians consolidated with the small group of installation and service technicians represented by the Union. New hires refers to all installation and service technicians hired after the 2014 Broadview merger. P1 employees are installation and service technicians from the 2016 merger between ADT and Protection One, another security service company.

however, were impounded and later incinerated along with the exercise of free will of the installation and service technicians at ADT's DFW facilities. It is through this lens from which the Board must analyze the allegations in the General Counsel's Sixth Consolidated Complaint.

ADT's responses to the Union's information requests and the alleged unilateral changes are affected largely by the uncertainty surrounding the results of the RM petition which took over two years to resolve. The Board waited until May 17, 2017 to issue a decision wherein it vacated the direction of election and dismissed the RM petition — leaving ADT no choice but to unilaterally withdraw recognition of the Union. If it did not respond to outstanding information requests, if it made changes to work rules or other terms and conditions of employment without bargaining with the Union — it was because the Union, quite simply, did not exist. The one change implemented prior to ADT's withdrawal of recognition was done pursuant to its reasonable interpretation of ADT's right to make and enforce reasonable work rules under the labor agreement. All other changes took effect after ADT withdrew recognition of the Union.

There is no evidence whatsoever of animus, bad faith, or intent to undermine the Union throughout the entire record. The suspension and termination of Service Technician Arthur Whittington was a direct result of his misconduct after he engaged in repeated time card fraud within a short span of time amounting to time theft. There is no correlation between Mr. Whittington's participation in the RM case or his position as Union steward and ADT's decision to suspend and terminate him. In fact, ADT based its decision to terminate Mr. Whittington on the findings and recommendations made by a Service Manager and a Regional Human Resources Manager who had no involvement in the proceedings in the RM case. For these reasons, and those more thoroughly explained below, the Sixth Consolidated Complaint should be dismissed in its entirety.

STATEMENT OF THE CASE[2]

On or about February 23, 2018, a Sixth Consolidated Complaint (the "Complaint") and Notice of Hearing was issued by the Regional Director of Region 16 alleging ADT violated Section 8(a)(5), (3), and (1) of the Act. (GC Ex. 1(jjj)). The Complaint consists of the following twelve charges: Case No. 16-CA-144548 (dated January 15, 2015 and amended on or about February 4, 2015 and February 5, 2015); Case No. 16-CA-168863 (dated February 1, 2016 and amended on or about April 15, 2016); Case No. 16-CA-172713 (dated March 25, 2016); Case No. 16-CA-179506 (dated July 5, 2016); Case No. 16-CA-180805 (dated July 25, 2016); Case No. 16-CA-181198 (dated July 27, 2016); Case No. 16-CA-187497 (dated October 31, 2016); Case No. 16-CA-191963 (dated January 26, 2017); Case No. 16-CA-199947 (dated June 1, 2017 and amended on or about June 8, 2017); Case No. 16-CA-200961 (dated June 16, 2017); Case No. 16-CA-209070 (dated October 30, 2017); and Case No. 16-CA-209995 (dated November 15, 2017). (GC Ex. 1(a)–(ggg)). ADT filed its Answer to the Complaint on March 9, 2018 denying most of the allegation in the Complaint. (GC Ex. 1(lll)). A hearing took place on March 20–22, 2018, April 30, 2018 and on May 1, 2018 before Administrative Law Judge Robert E. Ringler in Fort Worth, Texas. (Tr. 1, 186, 419, 602, 728).

STATEMENT OF THE FACTS

I. ADT's Reorganization of its DFW Operations

ADT is a national corporation providing electronic security systems and services including the installation and service of residential and commercial security systems. *ADT, LLC*, 365 NLRB

[2] References to the transcript of proceedings are designated as (Tr. ____). References to the General Counsel Exhibits are designated as (GC Ex. ____). References to Union Exhibits are designated as (U. Ex. _____). References to Respondent's Exhibits are designated as (R. Ex. _____).

No. 77, at *1–2 (May 17, 2017).[3] Before the acquisition of Broadview, one of ADT's competitors, ADT's DFW operations consisted of a facility in Carrollton and another in Haltom City. *Id*. The Union represented the service technicians and installers at the Carrollton and Haltom City facilities under a collective bargaining agreement. *Id*. When Tyco, ADT's former parent company, acquired Broadview in 2010, ADT took over Broadview's Mesquite facility, Irving facility, and South Loop facility. *Id*. The service technicians and installers at these facilities were not represented by a union. *Id*. In early 2014, subsequent to the acquisition of Broadview, ADT reorganized its facilities in DFW. (*Id*.; Tr. 704–05). The original Carrolton facility was closed and replaced with a new Carrolton facility. *Id*. The Mesquite, Irving, and South Loop facilities were replaced with the Trinity and Tyler facilities, and the Haltom City facility remained in its original location. *Id*. At the time of the reorganization, the majority of ADT's service technicians and installers in DFW were non-union, former Broadview employees. (*Id*.; Tr. 288–89, 704–06). As a result of this reorganization, the unionized ADT employees and the non-union, former Broadview employees were combined and redistributed among the four facilities. *Id*. More specifically, 70 former Broadview, non-union, employees merged with 58 unit employees. *Id*. Consequently, ADT has employed both unionized and non-unionized installers as well as unionized and non-unionized service technicians at the Trinity, Haltom City, and the new Carrolton facilities, while the Tyler facility currently has only union installers and service technicians. *Id*. In 2016, ADT merged with Protection 1, another security service company, combining the non-union, former P1 employees with its already consolidated group of installation and service technicians in the DFW area. (Tr. 611, 715). All installation and service technicians share similar, if not, nearly identical working

[3] At the hearing, Judge Ringer granted ADT's request that the Judge take administrative notice of the underlying RM petition, Case No. 16-RM-123509, as well as the pending RD petition, Case No. 16-RD-152333, and any Board documents regarding the same. (Tr. 8-9, 846).

conditions, benefits, pay, locations, supervision and perform the same or similar work. (*Id*. at *2; Tr. 127, 704–08). At one point, and for some time, the Union believed that Broadview employees should be included in the bargaining unit – that they shared a community of interest with the legacy Union employees. (Tr. 36–37).

II. Withdrawal of Union Recognition

On March 3, 2014, ADT filed an RM petition, Case No. 16-RM-123509, asking the Board to conduct an election among the following unit of employees: *"All install and service technicians at ADT's Carrollton, Tyler, Trinity, and Haltom City facilities in the Dallas/Fort Worth area." Id*. at *2. A hearing was held on January 27, 2015 to determine the appropriate bargaining unit. On March 9, 2015, Regional Director Martha Kinard issued a Decision and Direction of Election calling for a secret ballot election among the employees in the petitioned-for unit. The election took place on April 8, 2015. *Id*. at *1. The votes were impounded after the Union filed a request for review with the Board. On May 15, 2015, employees in the bargaining unit filed an RD petition, Case No. 16-RD-152333, seeking to decertify the Union as their bargaining representative. (R. Ex. 10; Tr. 718–19). Prior to the filing of the RD petition, employees in the bargaining unit presented ADT with an employee petition signed by more than fifty percent of the unit employees, asking that ADT "withdraw recognition from this union immediately." (R. Ex. 10; Tr. 718–19). While ADT had the opportunity to withdraw recognition based on this objective evidence, it did not. It followed the Board's preferred route through the RM petition. On or about May 22, 2015, the Regional Director blocked processing of the decertification petition pending resolution of the RM petition.[4] On May 17, 2017, the Board issued its Decision on Review and Order reversing the Regional Director's Decision, vacating the Direction of Election, and dismissing the RM petition

[4] As of the filing of this brief, the RD petition continues to be blocked, but remains open.

on a mere technicality. *ADT, LLC*, 365 NLRB at *6. On May 31, 2017, after receiving notice of the Board's decision, the Company withdrew recognition from the Union based on the Union's loss of majority support via a letter to the Union President stating "[i]nasmuch as the unit in which your organization seeks to bargain is plainly inappropriate I am writing to advise that ADT will not bargain in such unit; and, to the extent necessary, hereby withdraws recognition." (R. Ex. 11; Tr. 719–20).

III. ADT's Electronic Time Reporting and Vehicle Tracking Systems

ADT uses a system known as Telematics to track company vehicles via GPS. (Tr. 648). It uses as system known as Mastermind is the system used to monitor customer service requests. Mastermind stores the customer name and location, the date and time of the request, the technician assigned to the request, and the status of the request. (Tr. 655). Mastermind records include the technician's "en-route" time, *i.e.*, when he/she starts his/her drive to a customer site as well as his/her "on site" time, *i.e.*, when he/she arrives at the customer's location. (Tr. 67, 655). The en-route time is set by the technician through the electronic system on his/her vehicle. (Tr. 67). Mastermind records are reviewed regularly by management to measure attainment (*i.e.* the percentage at which customer service requests are completed within ADT's twenty-four hour objective). (Tr.624–625). Service technicians submit their time daily through an electronic daily time card. (Tr. 465, 629, 655–56). The electronic daily time card includes the technician's start time, arrival time at first customer site, the time and duration of his/her lunch break and the departure time from the last customer site serviced. (R. Ex. 1).

IV. Suspension and Discharge of Art Whittington

Mr. Whittington is a former Service Technician employed by ADT at its Carrollton office. (Tr. 433–34). On or about May or June 2016, Mr. Whittington voluntarily transferred to the small

business department[5] where he worked until his termination in July 2016. (Tr. 434–35). His direct supervisor at the time of his termination was Service Manager Derek Roberts. (Tr. 435). Mr. Whittington's geographical work area spanned from Route 635 up to McKinney, Texas. (Tr. 657–58). The drive time from one end of his geographical jurisdiction to the other was about thirty-five to forty-five minutes. (Tr. 657–58).

On or about June 10, 2016, while conducting a routine review of Mastermind records, Mr. Roberts identified what he perceived to be an unusually long period between Mr. Whittington's en-route time and on site time. (Tr. 622–24). Specifically, he noted, there was a two hour difference between the en-route time (10:51 AM) and the on site time (1:01 PM) and there was nowhere within Mr. Whittington's geographical work area that would require Mr. Whittington to drive for two hours to get from one assignment to the next. (Tr. 623, 632). This prompted Mr. Roberts to review Mr. Whittington's time records for that date. (Tr. 630). He found that on June 10, 2016, Mr. Whittington reported a lunch break[6] from 11:15 AM to 11:45 AM, leaving 1 hour and 40 minutes of time without explanation. (Tr. 623, 632, 638; R. Ex. 1).

Mr. Roberts did not take immediate action; he decided he would keep an eye on Mr. Whittington's Mastermind and time reporting records to determine whether the June 10 incident was a "one-off" (*i.e.*, something happening only once, a mistake) or evidence of a pattern of misconduct. (Tr. 630). If there were additional similar incidents, he thought, then the conduct was intentional and evidence that he was "committing a fraud on his timecard." (Tr. 630:14–18). Mr.

[5] Mr. Whittington's transfer to the small business department was described by Mr. Skelton as a lateral promotion. (Tr. 249). Scheduling is more stable and employees are less likely to work on evenings or Saturdays in the small business department. (Tr. 295–97).

[6] Service technicians can take up to an hour unpaid lunch between 11 a.m. and 2 p.m. (Tr. 80, 240–41, 465–66, 638). The lunch break starts the moment the service technician deviates from route to his/her next assignment for purposes of taking a lunch break. (Tr. 82, 518–19, 697, 750).

Roberts reviewed Mastermind and other records including Mr. Whittington's electronic time sheets and Telematics reports for the June 8–14 pay period and, in doing so, compared Mr. Whittington's travel time with the estimated travel times on Google Maps. (Tr. 628, 647). On June 16, 2016, Mr. Roberts sent Human Resources Manager Caroline Vassey an email outlining what he discovered:

> I noticed last Friday night when I was looking to make sure all of my jobs closed that it took an unusual amount of time for Art to get from 1 job to the next. He went enroute at 10:47 am and didn't make it to his job until 13:10. I received and email that shows he got home at 11:48 am and he left his home at 12:35 pm. Google maps shows the travel time in between jobs was 21min. He only put 30 min lunch on his time card from 11:15 to 11:45. His lunch was clearly longer than that. Also when I discovered this it made me look back at other days this week. He appears to have a pattern going here. When I looked at it this morning it appears he did the same thing on 6-8 and on 6-14. My guess is that if we were to go back we would probably find more instances of this. Please let me know how to handle this situation. Please see attachments.

(R. Ex. 2; Tr. 631). In response, Ms. Vassey advised Mr. Roberts that due to the severity of this type of infraction —time card fraud— he "w[ould] need more daily details and [to] outline specifically the days, and the inaccurate times for each day" — adding he could review records going back to June 1st. (Tr. 639; R. Ex. 3). Then, she added, "you will need to pull Art in, with union representation, and get his side why each day he submitted an inaccurate time card." (R. Ex. 3). Mr. Roberts followed Ms. Vassey's instructions — he reviewed records from June 1 through the last week of June 20. (R. Ex. 4) and prepared a detailed summary of his findings. He organized his findings as follows:

Date		MMB ER	Lunch Start	Lunch End	GPS Home	GPS Leave	MMB Onsite	32 minute Trip time
6/10/16	MMB	10:51					13:01	2:10 enroute time
	GPS				11:50	12:35		59 min to home : 45 minutes at home
	Payroll Lunch		11:15	11:45				30 minute lunch claimed

6/1/16		MMB ER	Lunch Start	Lunch End	GPS Home	GPS Leave	MMB Onsite	20 minute Trip time
	MMB	11:14					13:23	2:09 enroute time
	GPS							3 Stops (41 min idle/stop time not at site)
	Payroll Lunch		12:00	12:30				30 minute lunch claimed

6/8/16		MMB ER	Lunch Start	Lunch End	GPS Home	GPS Leave	MMB Onsite	32 minute Trip time
	MMB	6:28					7:31	1:05 enroute time
	GPS					6:44		
	Payroll Lunch							

6/8/16		MMB ER	Lunch Start	Lunch End	GPS Home	GPS Leave	MMB Onsite	32 minute Trip time
	MMB	12:44					14:24	1:40 enroute time
	GPS				1:19	1:55		35 minutes home : 36 minutes at home
	Payroll Lunch		13:00	13:30				30 minute lunch claimed

6/14/16		MMB ER	Lunch Start	Lunch End	GPS Home	GPS Leave	MMB Onsite	32 minute Trip time
	MMB	11:17					13:08	1:51 enroute time
	GPS				11:48	12:35		31 minutes home : 47 minutes at home
	Payroll Lunch		12:00	12:30				30 minute lunch claimed

6/17/16		MMB ER	Lunch Start	Lunch End	GPS Home	GPS Leave	MMB Onsite	42 minute Trip time
	MMB	12:10					13:37	1:27 enroute time
	GPS				12:38	13:14		28 minutes home : 36 minutes at home
	Payroll Lunch		12:30	13:00				30 minute lunch claimed

6/20/16		MMB ER	Lunch Start	Lunch End	GPS Home	GPS Leave	MMB Onsite	24 minute Trip time
	MMB	10:36					11:56	1:20 enroute time
	GPS				11:01	11:29		25 minutes home : 28 minutes at home
	Payroll Lunch		11:00	11:30				30 minute lunch claimed

(R. Ex. 4; Tr. 620–57). Mr. Roberts organized the information he collected by date, mapping out the total trip time between assignments, identifying the lunch time reported and calculating the discrepancies in his time reporting. (R. Exs. 1, 2, 4–5; Tr. 641). During his investigation, Mr. Roberts further noted that the Telematics records showed Mr. Whittington was making numerous stops between assignments for reasons unrelated to any work assignment. (Tr. 653; R. Ex. 5).

Based on these findings, a meeting was held with Mr. Whittington on or about June 30, 2016 to discuss the discrepancies in his time records for the June 2016 time period. (Tr. 70–71, 467–69). The meeting was about twenty minutes long. (Tr. 486). In attendance was Mr. Whittington, Union representative Ken Stephens, Union Steward William Skelton, Mr. Roberts, Ms. Vassey and another ADT Manager, Ken Arceneaux. (Tr. 70–71, 467–69). Mr. Roberts showed

Mr. Whittington a copy of the Mastermind records documenting his en-route and on site times, the Telematics records listing his locations and time spent per location as well as the accompanying maps marking the locations in which he sat idle. (Tr. 72–73, 243–44, 359). Mr. Whittington was then offered an opportunity to explain the discrepancies in those records. (Tr. 72–73, 243–44, 359). Chief Union Steward, Kevin Kimber, was also given the opportunity to submit a rebuttal. (R. Ex. 15).

During the entirety of the meeting, Mr. Whittington made no mention of needing to go home during his lunch break for reasons related to his alleged diabetes or any other alleged medical condition. (Tr. 74, 303–04, 358). As of the hearing in this case, Mr. Roberts had no knowledge of Mr. Whittington's alleged diabetes or any other alleged medical condition. (Tr. 74). Mr. Whittington provided no evidence of knowledge by any company representative present at the June 30 meeting (or the ultimate decision maker) of his alleged diabetes. (Tr. 473–76). There was no conversation about Mr. Whittington's alleged medical condition at the June 30 meeting. (Tr. 74, 246, 297–99, 358). While he alleged that all service technicians were going home for lunch, he provided no plausible explanation for his delayed route times or any of the discrepancies in his time records, except "it could have been anything, traffic, construction, an accident." (Tr. 470–71). Mr. Whittington refused to review the Company's records even though he was given the opportunity to do so. (Tr. 297–99, 470–71). In fact, when offered records illustrating some of the time discrepancies in question, Mr. Whittington refused to review the records stating "I looked at the piece of paper, I said, GPS isn't in our contract … [y]ou can't use it for disciplinary. And I slid it back across the table…" (Tr. 472:1–5). ADT did not dispute that service technicians may go home for lunch. (Tr. 754). Travel time home, as soon as it deviates from the route to an assignment, and the time spent at home for lunch break, however, must be reported as his/her unpaid lunch

break. (Tr. 82, 518–19, 697, 750). Taking a detour home and then taking a one-hour lunch break at home constitutes a violation of the ADT's lunch break policy. (Tr. 176, 283–84).

On Ms. Vassey's recommendation, Mr. Whittington was suspended pending further investigation. (Tr. 74–75, 744–45). As part of ADT's continuing investigation, the Mastermind and Telematics records, including related Google maps, and electronic time cards were forwarded to ADT's Director of Labor Relations, James Nixdorf[7], for review. (Tr. 738, 745). Based on the breadth of information gathered during Mr. Roberts's investigation and the information obtained at the June 30 meeting with Mr. Whittington, Mr. Nixdorf determined Mr. Whittington's conduct was "a pattern as opposed to a one off" of theft, warranting immediate termination. (Tr. 739, 742:9–12, 745–47). As Mr. Robert put it, "when you're sitting at home and getting paid and you know you're not supposed to be at home and you're running into overtime, clocking TO [sic] and you're getting paid, that's theft." (Tr. 109:10–13). Mr. Whittington's union activities had no impact in the decision to discipline and ultimately terminate him. Mr. Skelton stated, consistent with his May 13, 2016 Board affidavit, that he "never heard anyone in management say anything negative about Art Whittington, about his union activity or anything else" (Tr. 284–85). In his April 15, 2016 Board affidavit, Mr. Whittington himself stated that he "never heard anyone in management say anything critical or hostile towards [him] regarding his union activity or grievance-filing activity." (Tr. 501).

On or about July 18, 2016, following the completion of ADT's investigation into Mr. Whittington's misconduct, a second meeting took place where Mr. Whittington, in the presence of his union representatives, was informed of ADT's decision to terminate his employment. (Tr. 373–

[7] As Director of Labor Relations, Mr. Nixdorf is responsible for approving any discipline, up to and including termination, of any union employee. (Tr. 693).

74). Again, Mr. Whittington was given the opportunity to participate in the meeting, to explain the discrepancies in his time records. (Tr. 509–10). Again, Mr. Whittington chose not to do so. (Tr. 510). Mr. Whittington provided no testimony establishing that he ever informed any of the Company representatives at his suspension or termination meeting of any alleged medical condition or that he provided any tangible explanation for the discrepancies in his time records. (Tr. 475–76). He assumed ADT knew because management employees like Mr. Roberts and Mr. Shedd had worked side by side with him. (Tr. 473–76, 509–10). There is no evidence on the record to substantiate that. None of the affidavits provided by Mr. Skelton in the underlying charges related to Mr. Whittington's suspension and termination made any mention of Mr. Whittington's alleged diabetes. (Tr. 280).

ADT has no knowledge of any other employee who engaged in the same misconduct and was not terminated. (Tr. 756). In fact, at least one other technician has been terminated for submitting inaccurate time cards. (R. Ex. 16). On or about March 2, 2015, Blaine Hancock, an installation technician at the Trinity facility, was terminated for submitting "multiple entries into his Electronic Daily Timecard (ETD) that reflected arrival at a customer's site when he was still at home or enroute" during the period ranging from February 19–25, 2015. (R. Ex. 16). Mr. Hancock received a verbal written warning on or about February 18, 2015 after ADT discovery one time sheet in which his time records were not matching one another. (GC Ex. 39(f)). Mr. Hancock was terminated as soon as additional incidents spanning a six-day period were discovered by ADT. (R. Ex. 16). Further, while there are records of other employees who submitted inaccurate records, there are no records of any employee —technician or otherwise— who committed repeated and consistent time card fraud on numerous occasions as did Mr. Whittington. (GC Exs. 37, 39; R. Ex. 16).

V. Technician Meetings at DFW

Mr. Roberts has been a Service Manager at ADT's Carrollton office since 2015. (Tr. 52–53). His primary responsibility as Service Manger is to oversee about seventeen service technicians for purposes of maintaining efficiency and accuracy in services to both residential and commercial customers, including small businesses. (Tr. 619). Prior to his promotion to Service Manager, Mr. Roberts was a service technician and Union member. (Tr. 619). Mr. Roberts regularly held meetings with his service technicians to discuss general employment issues including safety topics, production quality and metrics. (Tr. 54–55). The focus of these meetings was safety, customer service, and productivity. (Tr. 54–55). During these team meetings, there were no discussions regarding grievances, the status of bargaining negotiations, or who was or was not considered a bargaining unit member. (Tr. 289–90). Mr. Roberts denied telling employees that they were not going to get a raise because of the union contract. (Tr. 60–61).[8]

On or about December 2015, during a routine meeting with service technicians led by Mr. Shedd, with Mr. Roberts in attendance, a discussion ensued regarding ADT's policy requiring technicians to complete all jobs on schedule before closing out for the day. (Tr. 58, 138, 292). In response to a refusal to comply with this policy, Mr. Roberts stated —for the first and only time— that "if they did not like ADT there were plenty other jobs hiring." (Tr. 58–60). Service Technician, Shawn Bieker, testified to one meeting where he heard this statement made. (Tr. 138). Similarly, Service Technician, Paul Lindner, testified he recalled one incident, and no other, where service

[8] Service technician Richard Grinnell as well as Mr. Skelton testified hearing something about pay raises sometime in August 2017, after ADT had withdrawn from the Union. (Tr. 180–81, 317–18). Mr. Bieker stated he heard Manager Jonah Serie make a statement about pay raises during the time when ADT and the Union were in contract negotiations. He further testified he understood a pay raise could not be given until the contract settled and that at that time contract negotiations had not settled. (Tr. 166–67)

technicians were told "if we didn't like it, that this job might not be for you and there's the door." (Tr. 115:1–19).

VI. The Labor Agreement

Mr. Nixdorf, is responsible for negotiating and administering all of ADT's labor agreements in the U.S. and Canada. (Tr. 692). The last labor agreement negotiation between ADT and the Union maintained a substantial management rights clause. (GC Ex. 4). Article 1, Section 2, of that labor agreement states, in pertinent part:

> SECTION 2 The operation of the Employer's business and the direction of the working force including, but not limited to, the making of the enforcement of reasonable rules and regulations relating to the operation of the Employer's business, the establishment of reporting time, the right to hire, transfer, layoff, promote, demote, discharge for cause, assign or discipline employees, to relieve employees from duties because of lack of work or other legitimate reasons, to plan, direct and control operations, to determine the amount and quality of work needed to introduce new or improved methods, to Change existing practices, and to transfer employees from one location or classification to another is vested exclusively in the Employer, subject, however, to the provisions of this Agreement.

(GC Ex. 4).

VII. ADT's Policies Pre and Post Withdrawal of Recognition

After suspicions that the Company's sick leave policy was being abused (*i.e.* instances of employees extending their weekends by calling in sick immediately before or after the weekend), ADT modified its sick leave policy in 2016 by requiring employees to submit documentation verifying their use of sick leave. (Tr. 97, 141). The lunch break policy did not change in 2016. (Tr. 82–83). ADT has at all times relevant permitted legacy employees to take up to an hour as an unpaid lunch break between 11 a.m. and 2 p.m. (Tr. 80, 240–41, 465–66, 638). The lunch break has, at all times relevant, started the moment a service technician deviates from the route to his/her next assignment for a lunch break. (Tr. 82, 518–19, 697, 750). That is, as confirmed by Mr. Lindner, the hour lunch break starts "[t]he point in time from the time you leave the customer site

and cease performing work to when you return to performing work either at the site or another one." (Tr. 123:23–124:2). Mr. Skelton and Mr. Whittington both testified that when an employee is actively en route from one work site to another work site, lunch starts once the employee makes a stop to take lunch — which is different from the scenario where the employee is en route to his/her next work site. (Tr. 279–80, 518–519). One hour has always been the outer limit. (Tr. 124, 524–25).

Regarding the other policies in dispute, at the hearing ADT stipulated that it made unilateral changes to terms and conditions of employment after it withdrew its recognition of the Union in May 2017. (Tr. 687). Those post-withdrawal changes are summarized as follows. ADT changed its policy regarding the accrual and use of paid time off on or about October 2017. (Tr. 226, 270, 687–88). ADT changed its bereavement leave policy on or about August 2017. (Tr. 228–29, 688–89). The monetary expectation tied to up-sales (referred to by the Union as the sales quota) changed in late 2017 to an amount of no less than $500 in up-sales. (Tr. 148, 171, 231, 235, 689). ADT stopped processing grievances and deducting and remitting dues as of May 31, 2017, after it withdrew recognition of the Union. (Tr. 689–90). ADT also changed the pay period from weekly to bi-weekly on or about November 2017. (Tr. 690–91).

VIII. The Union's Information Requests

ADT received two information requests —one dated July 15, 2016 and the other dated August 9, 2016— regarding the suspension and termination of Mr. Whittington. (R. Exs. 13–14). ADT provided timely responses to both information requests. (Tr. 733–38, 785–86). ADT responded to the July 15 information request on July 22, 2016, including Mr. Whittington's 400+ page personnel file and responded to the August 9 information request that same day. (Tr. 734; 737–38). Mr. Kimber testified that regarding the December 19, 2014 information he did receive a response from Mr. Nixdorf and that he did not pursue that information request because the

information sought in his initial request was answered in a request submitted by another Union representative, Ron Swaggerty. (GC Ex. 8; Tr. 28–29). To the extent a response was required, ADT complied with the Union's information requests.

ANALYSIS

General Counsel's Complaint alleging ADT violated Section 8(a)(5), (3), and (1) of the Act should be dismissed in its entirety. The General Counsel fails to establish that ADT engaged in any wrongdoing under the National Labor Relations Act (the "Act"). ADT lawfully withdrew recognition of the Union based on the Union's long lost majority status. Its actions surrounding the Union's information requests, changes to its policies, communications with employees, and the discipline of Mr. Whittington were consistent with its obligations under the Act. There is no evidence of animus, bad faith, or intent to undermine the Union. For these reasons, as more thoroughly explained below, ADT asks the Administrative Law Judge to dismiss the Complaint in its entirety.

I. ADT LAWFULLY WITHDREW ITS RECOGNITION OF THE UNION BASED ON THE UNION'S LOSS OF MAJORITY STATUS

The Union lost majority status in February 2014 when ADT reorganized its DFW facilities combining and redistributing its 58 legacy employees and the 70 Broadview employees among its Carrollton, Haltom City, Trinity, and Tyler facilities. *ADT, LLC*, 365 NLRB No. 77, at *1 (May 17, 2017). Board law dictates that a group of unrepresented employees should not be considered an accretion to a historical unit where the unrepresented employees outnumber the represented group. *See, e.g., Renaissance Ctr. P'ship*, 239 NLRB 1247 (1979) (A group of historically unrepresented employees was not an accretion where they "numerically overshadow[ed] the existing certified unit."); *Central Soya Co.*, 281 NLRB 1308, 1309 (1986) ("[T]he Board has

effectively found valid accretions in cases involving approximately equal size groups even when the represented employees barely constituted a majority of the combined work force.").

In this case, ADT could have lawfully withdrawn recognition from the Union in early 2014 based on the Union's actual loss of majority status under an accretion analysis. The same result follows under the Board's holding in *Levitz*. *See Levitz Furniture Co.*, 333 NLRB 717 (2001) (an employer may lawfully withdraw recognition from an incumbent union "where the union has actually lost the support of the majority of the bargaining unit employees."). Where "the unit itself has undergone a substantial change" as a result of the consolidation of a majority group of unrepresented employees with a minority group of represented employees, and there is no showing that the union represents a majority in the new unit, "there is no obligation to recognize that union." *Nott Co.*, 345 NLRB 396, 401 (2005); *see also Renaissance Center Partnership*, 239 NLRB 1247, 1248 (1979) ("The Board, for example, will entertain a petition during the certification year when there occurs a radical fluctuation in the size of the bargaining unit within a short period of time and consequently the majority status of the certified representative can no longer reasonably be presumed.").

The record in Case No. 16-RM-123509 shows that since 2014, ADT's DFW operations have undergone substantial change. *See ADT, LLC*, 365 NLRB at *1. Subsequent to the acquisition of Broadview in 2014, ADT reorganized its facilities by closing and replacing its original Carrollton facility and replacing Broadview's Mesquite, Irving, and South Loop facilities with the Trinity and Tyler facilities. *Id.* Consequently, ADT merged both unionized and non-unionized installers as well as unionized and non-unionized service technicians at its DFW facilities, with a majority being non-union former Broadview employees. (*Id.*; Tr. 288–89, 704–06). While ADT had the opportunity to unilaterally withdraw recognition of the Union at the time of the 2014

integration, at the time of the 2015 RD petition or upon receiving a petition signed by more than 50 percent of the unit employees, asking that ADT "withdraw recognition from this union immediately" it waited —to its detriment—for the Board to resolve the RM petition. On May 31, 2017, after the Board's decision to vacate the direction of election and dismiss the RM petition, ADT made the only choice available — to withdraw recognition from the Union based on the Union's loss of majority support.

A. ADT made changes to its policies after the withdrawal of recognition

ADT does not deny that it made changes to some of its policies after May 31, 2017. As of May 31, 2017, however, ADT had no obligation to notify or bargain the Union regarding those changes. It is undisputed that an employer cannot make unilateral changes to terms and conditions of employment without first providing notice and an opportunity to bargain to the bargaining unit's labor representative. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962). Here, under applicable principles of accretion, ADT withdrew recognition of the Union on May 31, 2017 and was thereby absolved of any obligation to bargain with the Union regarding changes to terms and conditions of employment. *See Geo. V. Hamilton*, 289 NLRB at 1339; *see also Nott Co*., 345 NLRB at 401 ("Where there is an integration, but no accretion, an employer is not obligated to continue to bargain with the union, even as to an existing group of employees."). ADT stipulates that it made changes to its PTO policy on or about October 2017, the bereavement policy on or about August 2017, the up-sales policy in late 2017, the pay period on or about November 2017, and that it stopped processing grievances and deducting and remitting dues as of May 31, 2017 — all after it withdrew recognition of the Union on May 31, 2017. (Tr. 148, 171, 226–35, 270, 687–91). Because these change occurred after ADT lawfully withdrew its recognition of the Union based on the

Union's loss of majority status, the General Counsel cannot show that these changes occurred in contravention of the Act.

B. The pre-withdrawal change to its sick leave policy was based on its reasonable interpretation of the labor agreement

Moreover, where changes were made prior to May 31, 2017, such changes were made pursuant to ADT's reasonable interpretation of the labor agreement. Sections 8(a)(5) and 8(a)(1) of the Act are not implicated where the employer acted on "its reasonable interpretation of the parties' contract." *See NRC Corp.*, 271 NLRB 1212, 1213 (1984); *see also Westinghouse Elec. Corp.*, 313 NLRB 452, 452 (1993) (dismissing an 8(a)(5) allegation "[w]here . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or intent to undermine the union") (quoting *Atwood & Merrill Co.*, 289 NLRB 794, 795 (1988)). The Board "will not seek to determine which of two equally plausible contract interpretations is correct." *NCR Corp.*, 271 NLRB at 1213. Likewise, in *Phelps Dodge Magnet Wire Corporation*, the Board dismissed a complaint regarding an alleged violation of Section 8(a)(5) because "even though the Respondent's construction of article 16.5 may have been erroneous, its interpretation had a sound arguable basis." 346 NLRB 949, 952 (2006). The Board explained that in such circumstances the General Counsel fails to prove a violation. *Id*.

Here, the record shows that there was only one pre-withdrawal change involving ADT's sick leave policy. That change was done pursuant to Article 1 of the labor agreement, which vests ADT with, *inter alia*, the right to enforcement of reasonable rules and regulations relating to the operation of ADT's business, the establishment of reporting time, and the right to plan, direct and control operations. (GC Ex. 4). ADT's decision to require a doctor's note after suspicions of abuse of its sick leave policy was an exercise of its right to establish reasonable rules and regulations as expressly provided in Article 1 of the labor agreement.

C. There is no evidence that the lunch break policy was unilaterally changed in violation of the Act

Finally, the General Counsel failed to present evidence that ADT unlawfully changed the lunch break policy in May 2016 by requiring employees begin their lunch period as soon as they leave a customer's site. The lunch break has, at all times relevant, started the moment a service technician deviates from the route to his/her next assignment to take a lunch break. (Tr. 82, 518–19, 697, 750). As confirmed by Mr. Lindner, the hour lunch break starts "[t]he point in time from the time you leave the customer site and cease performing work to when you return to performing work either at the site or another one." (Tr. 123:23–124:2). Mr. Skelton's testimony is consistent.[9] (Tr. 279–80). Mr. Skelton and Mr. Whittington both testified that when an employee is actively en route from one work site to another work site, lunch starts once the employee makes a stop to take lunch which is different from the scenario where the employee is not en route to his/her next work site. (Tr. 279–80, 518–519). One hour has always been the outer limit. (Tr. 124, 524–25). Accordingly, the General Counsel fails to prove that ADT unlawfully changed the lunch break policy in May 2016 as alleged in the Complaint.

II. ADT did not engage in Coercive Conduct

The isolated, *de minimis* nature of one comment relating to the completion of work assignments, particularly when viewed in the context of the technician meeting on or about December 15, 2015, is far from the type of conduct found threatening or coercive under the Act. Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective

[9] Mr. Skelton testified that ADT shortened the lunch break from one hour to thirty minutes, which is not supported by any other testimony, and, more importantly, is not in the General Counsel's complaint. (Tr. 279; GC Ex. 1(jjj) at ¶ 18(b)). Mr. Whittington himself testified that employees have always had the option of taking a full hour. (Tr. 524–25).

bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). To assess whether an alleged statement is an unlawful threat, the Board considers all of the surrounding circumstances to determine if the statement could reasonably tend to have a coercive impact. *Federated Logistics & Operations*, 340 NLRB No. 36 (2003).

On or about December 15 2015, during a routine meeting with service technicians led by Mr. Shedd, with Mr. Roberts in attendance, a discussion ensued regarding ADT’s assignment policy requiring technicians to complete all jobs on his/her schedule before closing out for the day. (Tr. 58, 138, 292). Mr. Roberts admitted that in response to refusal to comply with ADT’s directive, he said —for the first and only time— that “if they did not like ADT there were plenty other jobs hiring.” (Tr. 58–60). Mr. Bieker and Mr. Lindner both testified this happened one time. Mr. Bieker testified to one meeting where he heard this statement made and Mr. Lindner testified he recalled one incident, and no other, where service technicians were told “if we didn’t like it, that this job might not be for you and there’s the door.” (Tr. 138, 115:1–19). The Board has found isolated comments made directly in response to an employee’s reference to union issues not violative of the Act. *St. Rita’s Med. Ctr*., 261 NLRB 357, 361 (1982) (holding an isolated, *de minimis* reference to a union in response to an employee’s statement about the union is not interrogation or otherwise violative the Act); *Frito Lay, Inc*., 341 NLRB 515, 517 (2004) (remarks about a union activity by a supervisor were not interrogation, or otherwise coercive, when the remarks were isolated and the subject was immediately dropped). In contrast, here, the focus of these meetings was safety, customer service, and productivity. (Tr. 54–55). There were no discussions regarding grievances, the status of bargaining negotiations, or who was or was not

considered a bargaining unit member at the December 15, 2015 meeting or any other technician meeting during the time period at issue. (Tr. 289–90).

Further, Mr. Roberts denied telling employees that they were not going to get a raise because of the union contract. (Tr. 60–61). Mr. Grinnell as well as Mr. Skelton testified hearing something about pay raises sometime in August 2017, after ADT had withdrawn from the Union. (Tr. 180–81, 317–18). Mr. Bieker stated he heard Mr. Serie make a statement about pay raises during the time when ADT and the Union were in contract negotiations. He further testified he understood a pay raise could not be given until the contract settled and that at that time contract negotiations had not settled. (Tr. 166–67). There is no evidence on the record that Mr. Roberts or any other company representative made statements regarding raises that were in any way coercive or otherwise violative of the Act.

III. ARTHUR WHITTINGTON WAS DISCHARGED FOR LEGITIMATE, NON-DISCRIMINATORY REASONS

When considering 8(a)(3) allegations of discrimination, the Board applies the analytical framework set out in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced* 662 F. 2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Praxair Dist., Inc.*, 357 NLRB No. 91, at *1 n.2 (2011). Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that (a) the employee was engaged in protected concerted activity; (b) the employer had knowledge of that activity; (c) the employer harbored animus against the activity; and (d) there is a causal link between the adverse action taken and the employer's alleged animus toward the protected concerted activity. If, and only if, the General Counsel establishes a *prima facie* case, the burden shifts to the employer to establish that it was motivated by legitimate objectives. *Wright Line*, 251 NLRB 1083. If the employer articulates a legitimate business reason

for the alleged conduct, the burden shifts back to the General Counsel to prove that the employer's proffered business justifications are a pretext for discrimination.

A. General Counsel cannot establish a prima facie discrimination case

The General Counsel did not (and cannot) meet its burden of proving any of the elements of a *prima facie* discrimination case under *Wright Line*. There is no evidence on record that Mr. Whittington was engaged in protected concerted activity in June 2016 when he submitted time sheets claiming wages for purportedly being on the clock when, in fact, he was not working. There is no evidence of any union animus. Nor is there any evidence of a causal link between the suspension and termination of Mr. Whittington and any purported protected concerted activity. ADT conducted a thorough and fair investigation into Mr. Whittington's time discrepancies which were discovered during a routine review of company records. The decision to suspend and terminate Mr. Whittington was based on the findings of Mr. Roberts and on the recommendation of Ms. Vassey who had no involvement in the RM petition proceedings. Mr. Whittington cannot escape the fact that he submitted falsified time records resulting in time theft on numerous occasions within a short span of time. Neither the General Counsel nor the Union refutes this fact (or even attempts to). Neither have shown that ADT's reasons for suspending and terminating Mr. Whittington are a pretext for discrimination

i. Mr. Whittington was not engaged in protected concerted activity when he repeatedly falsified his time records

In cases such as this one where the conduct giving rise to the employee's suspension and termination is not itself "protected concerted activity,"[10] the question of whether the employer had a reasonable belief that the employee engaged in the conduct becomes an essential element of the

[10] Neither the General Counsel nor the Charging Party have suggested that Mr. Whittington's conduct in June 2016 constituted "protected concerted activity."

Wright Line test:

> An employer who holds a good-faith belief that an employee engaged in the misconduct in question has met its burden under *Wright Line.*…This is true even if the employer is ultimately mistaken about whether the employee engaged in the misconduct.
>
> In any case in which the evidence is disputed concerning the disciplined employee's underlying misconduct, it would seem essential that the trier of fact must determine whether the employer had a good-faith belief in order to even begin an analysis of whether the employer would have imposed the same consequence in the absence of the anti-union animus.

Sutter East Bay Hospitals v. N.L.R.B., 687 F.3d 424, 434–35 (DC Cir. 2012) (citations omitted); *see also L'Eggs Products, Inc. v. NLRB.*, 619 F.2d 1337 (9th Cir. 1980) ("An employer may discharge an employee for good cause, bad cause, or no cause at all, without violating 8(a)(3), as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act… It follows that the Board has the burden of proving that a discharge was motivated by antiunion animus"); *Framan Mech., Inc.*, 343 NLRB 408, 412 (2004) (holding that employer lawfully discharged employees during a union organizing campaign, even though employer was aware that the alleged discriminatees were involved in the campaign, noting that it is "well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful."). "[T]he Act is not a shield protecting employees from their own misconduct or insubordination." *Guardian Ambulance Service*, 228 NLRB 1127, 1131 (1977); *see also The Timkin Co.*, 213 NLRB 486, 488 (1974) (holding that employee's union activity "does not insulate an employee from discharge for just cause.").

This is not a case in which Mr. Whittington's conduct leading to his suspension and termination was protected concerted activity and there is no evidence that his participation in the RM petition or role as Union steward had any bearing on the decision to discipline him for grossly

falsifying his time records. On or about June 10, 2016, while conducting a routine review of Mastermind records, Mr. Roberts identified what he perceived to be an unusually long period between Mr. Whittington's en-route time and on site time. (Tr. 622–24). He identified a two hour difference between the en-route time (10:51 AM) and the on site time (1:01 PM) and there was nowhere within Mr. Whittington's geographical work area that would require Mr. Whittington to drive for two hours to get from one assignment to the next. (Tr. 623, 632). Recognizing the June 10 incident could be a mistake, Mr. Roberts did not take immediate action; instead, he reviewed additional Mastermind and time reporting records. (Tr. 630). Only after doing this —after reviewing Mr. Whittington's Mastermind and Telematics records and identifying similar incidents involving significant discrepancies in his time reporting— did Mr. Roberts alert Human Resources. (Tr. 631, R. Ex. 3). It was evident to Mr. Roberts that Mr. Whittington had engaged in a pattern of misconduct.

At the suggestion of Ms. Vassey, who informed him that he "w[ould] need more daily details and outline specifically the days, and the inaccurate times for each day," Mr. Roberts reviewed and organized his findings for the June 1–20, 2016 period. (R. Ex. 4; Tr. 620–57). He organized his findings by date, mapping out the total trip time between assignments, identifying the lunch break reported versus what the GPS records captured and calculated the differences between them. (R. Exs. 1, 2, 4–5; Tr. 641). Mr. Roberts findings included:

- June 10, 2016 — Mr. Whittington spent 59 minutes driving home and 45 minutes at home but reported taking only a 30-minute unpaid lunch break. (R. Ex. 1, 4; 640–41, 646).
- June 1, 2016— total route time for what otherwise should have been a 20 minute trip was over two hours long and within those two hours Mr. Whittington made three stops, spent over 40 minutes at one of those stops (which was not the customer site), but reported taking

only a 30-minute unpaid lunch break. (R. Ex. 4–5).

- June 8, 2016— total route time for what otherwise should have been a thirty-two minute trip was over an hour and a half and within that time he spent 35 minutes driving home and 36 minutes at home, but reported taking only a 30-minute unpaid lunch break. (R. Ex. 2, 4).

Mr. Roberts identified additional similar discrepancies in Mr. Whittington's time records for June 14, 17, and 20. (R. Ex. 2, 4–5). It was based on these finding that ADT met with Mr. Whittington on June 30 to discuss the discrepancies in his records. At no point during the June 30 meeting (or at any time during the hearing in this matter) did Mr. Whittington provide any concrete explanation for the discrepancies in his time records. (Tr. 470–71). He said, rather, "*it could have been anything, traffic, construction, an accident*" (Tr. 471). While he alleged that all service technicians were going home for lunch, he provided no plausible explanation for his delayed route times or any of the discrepancies in his time records, except mere speculation. (Tr. 470–71). Mr. Whittington even refused to review ADT's records though he was given the opportunity to do so. (Tr. 297–99, 470–71). Instead, he "looked at the piece of paper, [and] said, GPS isn't in our contract … [y]ou can't use it for disciplinary. And I slid it back across the table…" (Tr. 472:1–5). He chose not to defend his misconduct. Because, quite simply, he could not.

It was based on the breadth of information gathered during Mr. Roberts's investigation and at the June 30 meeting with Mr. Whittington, that Mr. Nixdorf determined Mr. Whittington's conduct was "a pattern as opposed to a one off" of theft, warranting immediate termination. (Tr. 739, 742:9–12, 745–47). Now Mr. Whittington attempts to salvage his claims by alleging that he informed ADT that he was going home for reasons related to his alleged diabetes. This assumes ADT had knowledge of the alleged diabetes and accommodated a request to extend his lunch break

with pay as a result of his alleged diabetes. The record supports neither assumption.

ADT does not dispute that service technicians may go home for lunch. (Tr. 754). However, travel time home, as soon as it deviates from route to the next assignment and time spent at home for break must be reported as an unpaid lunch break. (Tr. 82, 518–19, 697, 750). Traveling home and then taking an extended lunch break while only reporting 30 minutes for lunch —which is what Mr. Whittington did repeatedly during the June 2016 period— is a violation of ADT's policies. (Tr. 176, 283–84). Mr. Skelton recognized that claiming thirty minutes for lunch but taking two hours would have a negative financial impact to the Company. (Tr. 283–84). Mr. Whittington made no mention —neither at the June 30 meeting nor at the July 18 meeting— of any medical condition or any other information explaining the discrepancies in his time records. (Tr. 473–76, 509–10). Mr. Roberts testified he had no knowledge of Mr. Whittington's alleged diabetes or any other alleged medical condition. (Tr. 74). None of the affidavits provided by Mr. Skelton in the underlying charges related to Mr. Whittington's suspension and termination (who was present at the disciplinary meetings) made any mention of Mr. Whittington's alleged diabetes. (Tr. 280). The record is void of evidence that any company representative present at the June 30 meeting had knowledge of Mr. Whittington's alleged diabetes or any accommodation request regarding the same. (Tr. 473–76).

ii. There is no evidence of union animus

Regardless of any union or other protected concerted activity by Mr. Whittington, ADT would have terminated Mr. Whittington for grossly falsifying his time on numerous occasions within a span of one month. There is no evidence of any union animus by Mr. Roberts or any other Company representative against Mr. Whittington's union activities. The Board requires that evidence of union animus must be substantial. *See Obars Machine & Tool*, 322 NLRB 275 (1996) (Board affirming dismissal of 8(a)(3) allegation where there was no credible evidence of

substantial union animus); *Fibrocan Corp.*, 259 NLRB 161, 171-172 (1981). "[A] company need not tolerate an employee who "refuse[s] to work, waste[s] time, break[s] rules, and engage[s] in incivilities and other disorders and misconduct" simply because that employee has engaged in protected activity." *Fiberboard v. NLRB*, 379 U.S. 203, 217 n. 11 (1964).

Rarely has there been a witness as forthright as Mr. Roberts. Mr. Roberts, a former service technician and Union member, testified "Union or no Union, I'm always going to try to do the right thing by everybody." (Tr. 672:2–12). When asked whether employees deserve an opportunity to correct an action he responded, firmly, "[i]t depends on what the action is … [i]f it's performance, absolutely. If it's theft, then that's something completely different." (Tr. 672:2–12). But "when you're sitting at home and getting paid and you know you're not supposed to be at home and you're running into overtime, clocking TO [sic] and you're getting paid, that's theft." (Tr. 109:10–13). Mr. Whittington's union activities had no bearing in Mr. Roberts review and investigation of Mr. Whittington's repeated time card fraud.

Mr. Skelton —who also testified for the Union in the RM petition and in arbitration cases and remains employed by ADT— confirmed, in accord with his May 13, 2016 Board affidavit, that he "never heard anyone in management say anything negative about Art Whittington, about his union activity or anything else" (Tr. 284 –85). In his April 15, 2016 Board affidavit, Mr. Whittington himself stated that he "never heard anyone in management say anything critical or hostile towards [him] regarding his union activity or grievance-filing activity." (Tr. 501). Falsifying time records is an indubitable violation of those implicit rules and expectations to which any employer may reasonably hold its employees. This is not a case of a mistake in calculation. Through record evidence and witness testimony, ADT has shown that regardless of any protected concerted activity it would have taken the same action in response to Mr. Whittington's blatant

violation of its policies.

iii. The suspension and termination of Mr. Whittington was not pretext for unlawful discrimination

Even if the Board determined the General Counsel established a *prima facie* discrimination case, ADT has proven that Mr. Whittington was terminated for repeated time card fraud constituting time theft. As explained above, under the *Wright Line* framework, if and only if the General Counsel establishes a *prima facie* case, the burden shifts to the Company to establish that it was motivated by legitimate objectives. *Wright Line, supra*. To this point, the Board has long held that even where the General Counsel establishes a *prima facie* case, the charge must nonetheless be dismissed when the employer establishes that it would have disciplined the employee regardless of their protected conduct.

General Counsel simply cannot show that ADT's actions were mere pretext for unlawful discrimination. *See Simplex Grinnell*, 01-CA-169310, 2017 WL 605059 (Feb. 14, 2017) (dismissing the complaint where there was "no evidence, as claimed by the General Counsel, that other employees were allowed to misstate their time records, much less that the employer knew about it and countenanced it [and] no evidence countering the credibly offered claim by the employer that in discharging these employees, it acted in conformity with its policies against the submission of falsified time records); *Covenant Homecare & Teresa P. Rector*, 331 NLRB 219, 221 (2000)(finding no causal link between termination and employer's alleged animus where employer presented evidence showing a consistent pattern of discharging employees who had falsified their time sheets). There is no evidence to show that ADT suspended and terminated Mr. Whittington for any reason other than the legitimate, nondiscriminatory reasons discussed above. There is no evidence on record of any other employee who repeatedly falsified his/her time records within a short span of time. The General Counsel offered no evidence where others engaged in the

same or similar misconduct were treated more favorably.

ADT enforces its policies uniformly. As the record shows, other technicians have been terminated for submitting inaccurate time cards. (R. Ex. 16). For example, on or about March 2, 2015, Blaine Hancock, an installation technician at the Trinity facility, was terminated for submitting "multiple entries into his Electronic Daily Timecard (ETD) that reflected arrival at a customer's site when he was still at home or enroute" during the period ranging from February 19–25, 2015. (R. Ex. 16). Mr. Hancock received a verbal written warning on or about February 18, 2015 after ADT discovered one time sheet in which his time records were not matching one another. (GC Ex. 39(f)). Mr. Hancock was terminated as soon as additional incidents spanning a six-day period were discovered by ADT. (R. Ex. 16). Mr. Whittington, was terminated for repeated and substantial violations spanning a three-week period. And while there are records of other employees who submitted inaccurate records, there are no records of any employee —technician or otherwise— who repeatedly committed time card fraud for which he got paid as did Mr. Whittington. (GC Exs. 37, 39; R. Ex. 16). ADT has no knowledge of any other employee who engaged in the same or similar misconduct and was not terminated. (Tr.695–96, 756).

B. Charging Party fails to prove Mr. Whittington's termination is an independent violation of Section 8(a)(1) of the Act

The Union cannot establish that Mr. Whittington's termination constitutes an 8(a)(1) termination under *Phoenix Transit System*, 337 NLRB 510 (2002). *Phoenix Transit* has no precedential value in this case. In *Phoenix Transit*, the Board found that charging party was discharged because of articles he wrote in the union newsletter regarding the employer's processing of employee sexual harassment complaints. The Board found the employee's conduct constituted protected concerted activity and the only issue to decide was whether the employee's conduct lost the protection of the Act because, as asserted by the employer, his articles disclosed

confidential information. *Phoenix Transit Sys.*, 337 NLRB 510 (2002). This is not a case where the employee was engaged in protected concerted activity when he engaged in the wrongdoing. This is not a case where the pivotal issue is whether the employee's conduct was removed from the Act's protection based on the severity of the misconduct. The *Wright Line* analysis is the appropriate analytical framework and for the reasons discussed above, the General Counsel fails to establish a *prima facie* discrimination case under *Wright Line*.

IV. ADT Met its Obligation to Supply Information under Section 8(a)(5) of the Act

ADT met its obligations under Section 8(a)(5) of the Act in response to the Union's information requests by either asserting legitimate objections to the information requested or providing the requested information and documentation. It is well established that the duty to supply information under the Act is not absolute. *See Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979) ("the duty to bargain collectively, imposed by Section 8(a) of the NLRA, includes a duty to provide *relevant* information requested by the union for the proper performance of its duty as the employees' bargaining representative") (emphasis added). "The obligation to supply information is determined on a case-by-case basis, and it depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it." *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

To the extent a response was required prior to the withdrawal of recognition, ADT complied with its obligations under the Act to respond to the Union's information requests. ADT engaged the Union in continuous communications regarding its various information requests. Mr. Kimber testified that regarding the December 19, 2014 information he did receive a response from Mr. Nixdorf and that he did not pursue that information request because the information sought in his initial request was answered in a request submitted by another Union representative Ron

Swaggerty. (GC Ex. 8; Tr. 28–29). ADT received and timely responded to two information requests —one dated July 15, 2016 and the other dated August 9, 2016— regarding the suspension and termination of Mr. Whittington. (R. Exs. 13–14; Tr. 733–38, 785–86). ADT responded to the July 15 information request on July 22, 2016, including amongst its production Mr. Whittington's personnel file consisting of over 400 pages of documents, and responded to the August 9 information request that same day. (Tr. 734; 737–38). There is no evidence on the record that the Union was prejudiced by any purported delay in response to its information requests. To the extent a response was required prior to ADT's withdrawal of recognition, ADT complied with its obligations under the Act. The General Counsel presents no evidence to refute that.

CONCLUSION

For the foregoing reasons, ADT asks the Administrative Law Judge to dismiss the Complaint in its entirety. ADT could have lawfully withdrawn recognition of the Union at the time of the 2014 integration, at the time of the 2015 RD petition or upon receipt of the petition signed by more than 50 percent of the unit employees, asking that ADT "withdraw recognition from this union immediately." To this day, neither the General Counsel nor the Board can justify a unit including some but not all employees who share a community of interest. ADT's responses to the Union's information requests and the alleged unilateral changes are largely effected by the uncertainty surrounding the results of the RM petition, which took over two years to resolve. There is no evidence in the record of union animus, bad faith, or intent to undermine the Union. The suspension and termination of Mr. Whittington was a direct result of his misconduct.

DATED this 22nd day of June, 2018

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By */s/ Jeremy C. Moritz*

Jeremy C. Moritz, Esq.
Norma Manjarrez, Esq.
155 North Wacker Drive - Suite 4300
Chicago, IL 60606
Phone: (312) 558-1220
Facsimile: (312) 807-3619

CERTIFICATE OF SERVICE

I certify that on June 22, 2018, a copy of the foregoing ***RESPONDENT ADT'S POST-HEARING BRIEF*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via U.S. First-Class Mail to the following parties (and e-mailed to Counsel for the General Counsel and Counsel for the Union):

Arturo Laurel
Maxie E. Gallardo
Counsel for the General Counsel
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24 Fort Worth, TX 76102-6178
Arturo.Laurel@nlrb.gov
Maxie.Gallardo@nlrb.gov

Matt Holder
DAVID VAN OS & ASSOCIATES, P.C
8626 Tesoro Dr., Suite 510
San Antonio, TX 78217
matt@vanoslaw.com

/s/ Norma Manjarrez
One of the attorneys for Respondent